

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.207 of 1990

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1. Narendra Pandit
 2. Subodh Pandit
 3. Shankar Pandit
 4. (a) Chakardhari Pandit, husband of late Urmila Devi (Daughter)
(b) Rajesh Kumar
(c) Pranab Kumar @ Munna, both sons of Chakardhari Pandit, All Residents of village, Baijal Pur, PS-Kharagpur, Distt-Munger.
(d) Shayma Devi (Daughter), Jamalpur, PS-Jamalpur, Distt-Munger.
- Appellant/s

Versus

1. Hiralal Pandit son of Chamroo Pandit.
 2. Moti Pandit minor son of Hiralal Pandit under guardianship of Sri Washi Ahmad, Advocate, G.A.L.
 3. Kishori Pandit
 4. Krishna Pandit
 5. Kritya Nand Pandit @ Kirti Pandit
 6. Binod Pandit, all sons of Khakhu Pandit.
 7. Daimanti Devi wife of Prayag Pandit, all residents of Mohalla Dalhatta Bazar, Bichli Gali, Kaliasthan, P.S. Kotwali, Distt-Munger.
 8. Smt. Subhadra Devi wife of Sri Bishundeo Pandit, Resident of Village, Gauripur, P.S. Jamalpur, Distt-Munger.
 9. Smt. Sulochana Devi wife of Sri Ramchandra Pandit, Resident of Co-operative Colony, Naya Plot No. 437, Bokaro City, Dhanbad.
 10. Smt. Sushila Devi daughter of Late Khakhu Pandit.
 11. Sri Raghunath Pandit son of Ganesh Pandit @ Baishakhi Pandit.
 12. Lallan Pandit, Minor,
 13. Raju Pandit, minor,
 14. Santosh Pandit, Minor, all minor sons of Raghunath Pandit under the guardianship of Sri Washi Ahmad, Advocate, G.A.L..
 15. Tilo Devi wife of Khakhu Pandit. All the residents of village, Mungraurea Jamalpur Pergana Sakaharapali, PO. And PS, Jamalpur District. Munger
- Respondent/s
- =====

Appearance :

For the Appellant/s : Mr. Parmeshwar Pd.
Mr. Suraj Narain Yadav
Mr. Pramod Kumar Sinha
Mr. Rakesh Kumar Sinha
Mr. Arvind Kumar Sharma-1, Advocates.

For the Respondent/s : Mr. Prashant Vedsen, Advocate
Mr. Suraj Narain Yadav, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

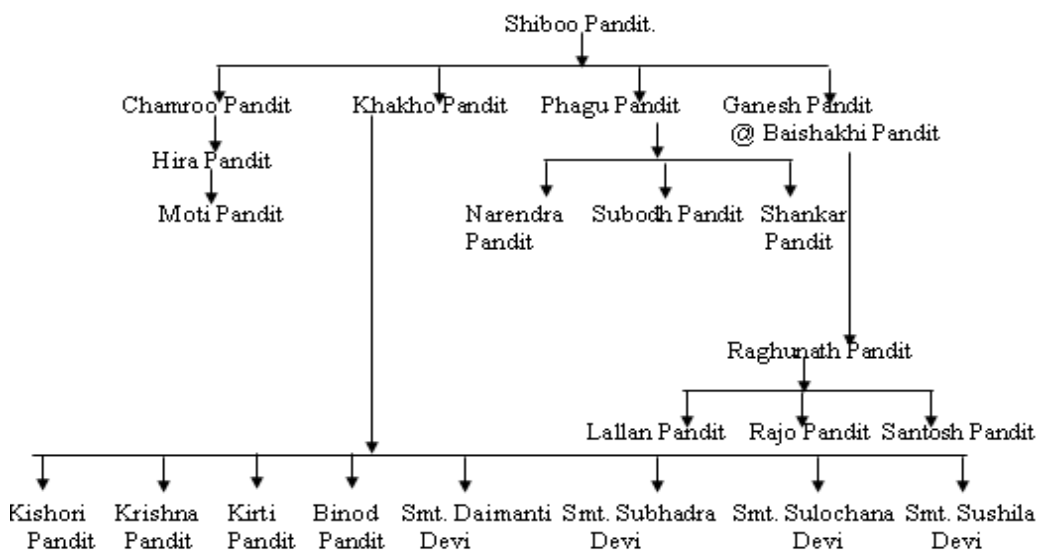
Date: 20-03-2015

Appellants/plaintiffs (henceforth referred to as plaintiff) have filed instant appeal against the judgment dated

31.03.1990, decree dated 16.04.1990 passed by Ravindra Nath Verma, Sub-Judge, 1st Munger in Title (Partition Suit) No. 61/1982 partly decreeing the suit identifying 1/3rd share concerning Survey Plot no. 2163, 2164, 2165, 2167, 2238 and dismissed the suit relating to Survey Plot No. 1754, 1755 and 3159 along with other plot of Schedule B of the plaint as well as failed to acknowledge ¼ share.

2. Inter se relationship amongst the parties is found detailed as per pedigree furnished hereinafter (Schedule- A):-

Genealogical Table :-



3. Shiboo Pandit was common ancestor who died leaving behind four sons, namely, Chamroo Pandit, Khakho Pandit, Phagu Pandit, Ganesh Pandit @ Baishakhi Pandit as well as properties detailed under Schedule-B of the plaint, wherefrom it is evident that sons of Phagu Pandit happens to be the plaintiff while remaining branches are the respondents/defendants (hereinafter referred to as defendant). It has been disclosed that plaintiffs and defendants constitute joint family governed by Mitakshara School. Even after



death of common ancestor, Shiboo Pandit, jointness amongst his heirs continued and in likewise manner joint possession over the properties detailed under Schedule-B. In due course of time, plaintiffs have demanded partition which defendants declined and lastly, showing the cause of action on 19.08.1982, the date on which defendants flatly refused to partition the property, after paying requisite court-fee filed the instant partition suit asking for declaration of 1/4th share in the suit property, followed with appointment of pleader-commissioner to carve out separate *patti* whereupon plaintiffs be put in possession, cost of the suit, any other relief or reliefs the plaintiff is found entitled for.

4. Under Schedule-B, the plaintiffs have detailed the ancestral properties possessed by the joint family as Survey Plot Nos. 1754, 1755, 2163, 2165, 2167, 2238 and 3159.

5. Each branch of the defendants filed separate WS. The branch of Chamroo Pandit, namely, defendants no. 1 and 2 filed WS wherein apart from raising ornamental objection, admitted para-1, 2 of the plaint. However, denied the other averments of the plaint over asking for partition by the plaintiffs in an evasive manner.

6. The branches of Ganesh Pandit @ Baisakhi Pandit having shown under defendant Nos. 11 to 14 out of whom defendants No. 12 to 14 have been shown minor under the guardianship of defendant no.11 have filed independent WS wherein the major objection has been raised over inclusion of Survey Plot No. 2166 under Schedule-B property (subsequently extracted) regarding which

these defendants have claimed to have purchased by his father out of his own earnings in the year 1947 and further, it was never given under common fund rather was being used and is being used as separate self acquired property without having any concern with other family members. It has also been submitted that that mutation has been effected in terms of sale-deed. His father had got a map passed from the municipality.

7. It has also been submitted that father of plaintiff had also purchased from his own savings a land lying by the side of Survey Plot No. 1755. It has also been submitted that Survey Plot No. 2168 do not belong to joint family rather it belongs to one Bhuj Narain Pandit and others without having any concern with their family and on account thereof, the aforesaid land should also be excluded from Schedule-B property (subsequently deleted).

8. Then it has been submitted that remaining plots which now stand under Schedule-B of the property happens to be joint family property being ancestral one left by common ancestor Shiboo Pandit who died leaving behind four sons and on account thereof, each one has got 1/4th share and in likewise manner, it should be partitioned. In para-13, he had detailed the plots possessed by joint family and further submitted that Survey Plot No.2164 should also be included (which subsequently been inserted). Then had accepted continuance of unity of title as well as possession with regard to the lands so detailed as well as also accepted presence of 1/4th share of

each brother in the suit property. It has further been submitted that on an earlier occasion, *Panches* were nominated for partition of the property however could not materialize. Therefore, partition be effected through the instant suit.

9. Now coming to the nature of the land, it has been submitted that Survey Plot No. 1754, 1755 and 3159 are situated on the main road known Safiabab Road while remaining plots are lying in the village and on account thereof, there happens to be vast difference in between nature of the land. After filing of WS at the end of descendants of Khakho Pandit arrayed as defendants no. 3 to 10 out of whom defendant no. 7 to 10, are daughters who did not appear, an amendment made in the W.S. whereunder claims of the defendant no. 3 to 6 have been blatantly denied with regard to handing over Survey Plot Nos. 1754, 1755 and 3159 by the remaining three brothers under deed of agreement and in likewise manner, the individual activity adopted by them in token thereof, including that of construction of house. It has further been pleaded that taking into account the location of the land coupled with its valuation, the defendants no. 3 to 6 have developed their greedy eyes to engulf the aforesaid properties completely and on account thereof, hatched such kind of story without any basis and foundation.

10. Defendants No.3 to 6 have pleaded their case independently whereunder they denied the status of the family to be joint and in likewise manner unity of title as well as possession. It has



further been pleaded that father of these defendants, namely, Khakho Pandit taking into account unscrupulous activities of remaining brothers, lastly served with an Advocate notice to partition the properties whereupon the remaining three brothers partitioned him from them and gave Survey Plot Nos. 1754, 1755, 3159 to their father and for that a deed of agreement was executed by remaining three brothers. Subsequently thereof, their father became separate by meets and bounds from his other three brothers and on account thereof, neither the plaintiff nor other defendants have any interest relating to Survey Plot Nos. 1754, 1755, 3159 and in the aforesaid background, these defendants also not put forward their claims with regard to remaining properties shown under Schedule-B of the plaint. Therefore, it has been averred that inclusion of Survey Plot Nos. 1754, 1755 and 3159 under Schedule-B of the plaint is on account of dishonest intention. It has further been submitted that with regard to remaining properties, the plaintiff and other defendants may be allowed to avail 1/3rd share each.

11. Then it has been submitted that Khakho Pandit during his life time got site plan sanctioned by Jamalpur Municipality, constructed house thereupon whereupon these defendants along with their families are residing. It has further been submitted that these defendants are under exclusive possession over Survey Plot Nos. 1754, 1755, 3159 since 1947 without any hitch and hindrance in exclusion of remaining three brothers and as so many 12 years have

passed, therefore, perfected their title by adverse possession. So prayed for dismissal of the suit with regard to Survey Plot Nos. 1754, 1755 and 3159.

12. The learned lower court on the pleading of the respective parties has framed following issues and decided issue no. 5 and 6 against plaintiff relating to Survey Plot Nos. 1754, 1755, 3159 while decreed the suit relating to remaining plots detailed under Schedule-B of the plaint by identifying 1/3rd share against which, the instant appeal has been preferred. The issues were as follows:-

- 1) Is the suit as framed maintainable ?
- 2) Have the plaintiffs got cause of action and right to sue ?
- 3) Is the suit barred by law of limitation, principles of estoppel, waiver and acquiescence and resjudicata ?
- 4) Is the suit bad for defect of parties ?
- 5) Have the plaintiffs and defendants unity of title and possession over the suit properties described in schedule B of the plaint ?
- 6) Are the plaintiffs entitle to get partition decreed and, if so for which property and for how much share ?
- 7) To what other relief or reliefs plaintiffs entitle ?

13. Learned counsel for the appellant has submitted that while partly decreeing the suit, the learned lower court failed to consider the basic ingredients of the Hindu Law. In support of such plea, it has been submitted that jointness amongst full brothers is fundamental principle of the Hindu Law and whoever controverts it, the burden goes upon him to prove the same. It has further been submitted that learned lower court while appreciating the evidence had failed to consider the basic principle of the Hindu Law and that

happens to be the reason behind acceptance of version of Respondent/Defendant No.3 to 6 to the effect that there happens to be presence of sufficient material to construe disruption of jointness amongst family.

14. In order to substantiate such plea, it has been submitted that properties having under Schedule-B of the plaint admittedly, ancestral one. After death of common ancestor Shiboo Pandit, his four sons who constituted joint Hindu Family continued with jointness. Admittedly, Schedule B property is ancestral property and on account thereof, each branch, being Class-I heir of Shiboo Pandit was entitled for 1/4th share and in likewise manner the total area of the lands possessed by the joint family shown under Schedule-B of the plaint, was to be bifurcated subject to category of the lands coupled with its market value.

15. It has been submitted that save and except all other defendants representing two brothers supported the same. So far plea of Respondent/Defendant No. 3 to 6 are concerned, it is based upon forged and fabricated document, Ext-A, B which have got no legal identity being unregistered one, and on account thereof, acceptance of those documents as a proof of partition by the learned lower court was nothing rather blunder mistake. To support the same, it has been submitted that from Advocate notice, it is apparent that it was not sent to remaining three brothers and therefore, its legal effect, though not acknowledgeable under the eye of law, also did not circumvent the

others whose absence is found from the notice itself.

16. Now coming to the major plank, Ext-B, it has been submitted that from perusal of Ext-B, it is apparent that it is not a deed of partition rather an agreement whereunder father of Respondent/Defendant No. 3 to 6 had not joined. Furthermore, its recital speaks absence of event of partition in the family as well as identification of 1/4th share and allotment of land in tune of 1/4th share. To buttress such plea, it has also been submitted that when total area of Schedule-B land is calculated inconsonance with the area shown under Schedule-B, it is apparent that approximately half area has been in favour of father of Respondent/Defendant No. 3 to 6 which, on its face appears to be unfair, unrealistic apart from the fact that the land being more valuable than the remaining land being on the main road which, in no way found to be probable one.

17. Apart from this, the document in question that means to say, Ext-B is not a registered document and further, properties having value of more than Rs. 100/- and further it gives a notion of transfer creating title and possession, consequent thereupon in terms of Section 17 of the Registration Act was to be registered one. The document, as argued being unregistered happens to be incompetent to acknowledge right, title and possession.

18. It has further been submitted that in WS Respondent/Defendant No. 3 to 6 have pleaded that they happen to be under exclusive possession since the day of execution of Ext-B



without having concern with other family members and on account of expiry of several 12 years, they have obtained perfect right of adverse possession. Furthermore, to support the same the rent receipt as well as map having been passed by the Jamalpur Municipality in name of father of Respondent/Defendant No. 3 to 6 have been filed which has itself been demolished by the evidence of defendant himself as well as other witnesses examined on his behalf. Apart from this, once document is found deficient one and further the plea of separation is found untenable then in that event, mere having mutation in the name of one of the coparceners, though it neither creates title nor is a document of possession, will not give a conclusive proof of partition and being so, the learned lower court should have considered with these three places bearing Survey Plot No. 1754, 1755 and 3159 happen to be joint family property and further, instead of granting 1/3rd share should have declared 1/4th share. So submitted that the judgment and decree passed by the learned lower court is illegal, erroneous and perverse as well as is fit to be set aside.

19. The other Respondent/Defendants have virtually, supported the plea of appellants/plaintiffs in likewise manner as pleaded before the learned lower court refuting the plea of the Respondent/Defendants No. 3 to 6 regarding previous partition whereunder they got exclusively Survey Plot No. 1754, 1755 and 3159, as well as having declaration of 1/4th share in the property detailed under Schedule B of the plaint.

20. On behalf of Respondent/Defendant No. 3 to 6, the finding recorded by the learned lower court has been supported on the plea that the same happens to be based upon proper appreciation of the evidence available on the record inconsonance with the documentary evidence placed on behalf of respective parties. Furthermore, elaborating submission, it has been submitted on behalf of Respondent/Defendant No. 3 to 6 that admittedly, properties under Schedule-B happens to be ancestral property. It has also been submitted that Shiboo Pandit was the common ancestor who died leaving behind four sons, Chamroo Pandit, Khakho Pandit, Phagu Pandit and Ganesh Pandit @ Baisakhi Pandit. The sons of Phagu Pandit is the appellants/plaintiffs while branches of remaining three brothers, namely, Chamroo Pandit, Khakho Pandit, and Ganesh Pandit @ Baisakhi are the Respondents/defendant. Then, it has submitted that taking into account the illegal activities of other three brothers, Khakho Pandit became apprehensive and asked for partition which the remaining three brothers declined and on account thereof, through Advocate notice asked for partition. Then thereafter, the remaining three brothers, after due deliberation and consultation executed an agreement in the year 1947 and through that agreement allotted and gave three plots bearing Survey Plot No. 1754, 1755 and 3159 to father of these defendants who accordingly, came under exclusive possession and since thereafter, neither father of these defendants remained as coparcener with their father nor the aforesaid

Survey Plot No. 1754, 1755 and 3159 remained as joint family property. Father of these defendants managed the aforesaid three plots in his individual capacity, got it mutated, applied for sanctioning of map for construction of the house, constructed house from his own saving and these defendants, after his death, is enjoying the properties without having connectivity with the plaintiffs as well as remaining defendants.

21. It has further been submitted that though document, Ext-B is unregistered but being more than thirty years, is admissible in the eye of law. Being so, the contents of the document is to be taken note of. If so, then from the averments, it is crystal clear that there happens to be concrete and positive evidence of separation in the family whereunder Khakho Pandit, father of these defendants came out of status of jointness leaving behind remaining three brothers constituting the joint family and being so, the learned lower court rightly identified those events as well as also found Survey Plot No. 1754, 1755 and 3159 out of properties to be partitioned as well as status of these defendants beyond the purview of instant suit. Hence, directing partition for remaining Survey Plot No. of Schedule-B property in 1/3rd share, is the right conclusion held by the learned lower court and that is fit to be confirmed. Consequent thereupon, appeal is fit to be dismissed with costs.

22. Altogether two witnesses have been examined on behalf of appellant/plaintiff while Respondent/Defendant No. 3 to 6

have examined seven witnesses. Witnesses have also been examined on behalf of other Respondent/Defendants. Apart from oral evidence, documentary evidence has been adduced on behalf of respective parties.

23. After hearing the parties as well as going through the learned lower court records the following points are formulated for just decision of this appeal:-

- A. Is the suit as framed maintainable ?
- B. Have the plaintiffs valid cause of action and right to sue ?
- C. Whether the suit barred by law of limitation, principles of estoppel, waiver and acquiescence?
- D. Have the plaintiffs and defendants unity of title and possession over the suit properties described in schedule B of the plaint ?
- E. Are the plaintiffs entitle to get partition in terms of claim to the extent of 1/4th share of the property detailed under Schedule-B ?
- F. To what other relief or reliefs plaintiffs entitled for ?

24. Like the learned lower court point nos. D and E are jointly dealt with. After going through the relevant pleadings, Genealogical table is admitted. That means to say, status of Shiboo Pandit being common ancestor who died leaving behind four sons, namely, Chamroo Pandit, Khakho Pandit, Phagu Pandit and Ganesh Pandit @ Baisakhi Pandit. That being so, the status of respective parties is also admitted. In likewise manner, there happens to be admission with regard to origin of the property detailed under Schedule B, being ancestral one. Now from the pleadings as well as nature of eventuality perceive thereupon, save and except



Respondent/Defendant No. 3 to 6 that means to say, branches of remaining three brothers have also admitted status of jointness. It happens to be only the branches of Khakho Pandit who had advanced plea of separation followed by allotment of Survey Plot No. 1754, 1755, 3159 exclusively to their father Khakho Pandit by the remaining three brothers, Chamroo Pandit, Phagu Pandit and Ganesh Pandit in the year 1947. In the background of presumption with regard to status of Hindu Mitakshara Family, under jointness, obligation is found over Respondent/Defendant No. 3 to 6 to support their plea that they ceased to be member of joint family as well as allotment of Survey Plot No. 1754, 1755 and 3159 in lieu thereof. Apart from this, an alternative plea has also been advanced, though, not in specific term, regarding adverse possession as remained under custody since 1947 without any interruption, exclusively, independently.

25. Before coming to discuss evidence (Oral as well as documentary) some sort of confusion is apparent from the judgment impugned with regard to Survey Plot No. 1756, 2166. As 1756 has been claimed by the appellants/plaintiffs to be their exclusive property purchased by their mother out of her own saving being self acquisition. In likewise manner Survey Plot No. 2166 has been admitted to be self acquisition of Respondent/Defendant No.11 and accordingly, are being away from Schedule-B. None of the parties have raised any objection and that being so, there is no necessity to make fruitless effort at that very score.

26. Now coming to the evidence, the appellant/plaintiff (PW-1) had reiterated his claim with regard to Schedule-B property. It is also apparent from his evidence that majority of the evidence as well as exhibits happens to be with regard to self acquisition of their mother relating to Survey Plot No.1756. In para-7, he denied that any kind of Advocate Notice was ever served on behalf of Khakho Pandit upon his father. He had further denied existence of any sort of agreement executed by his father as well as uncle in favour of Khakho Pandit. He had denied their signature over the agreement. Then at para-8, he detailed the property as well as his claim to the extent of 1/4th share. During cross-examination at para-9 he had stated that Hiralal had done repairing work, constructed septic latrine, effected electric wiring in the house wherein he is residing at his own cost. He had further stated that for the purpose of partition of property possessed by joint family Panches were nominated whereupon he had also put his signature. Furthermore, upto para-11 of his cross-examination, it is apparent that he was cross-examined on behalf of supporting defendants and further it is evident therefrom that he had stated that all are residing independently according to their convenient suitability. However, all the properties are jointly managed. Then he has been cross-examined on behalf of Respondent/Defendant No. 3 to 6. In para-12, he had stated that Survey Plot No. 1754, 1755 and 3159 lies by the side of main road while Survey Plot No. 2163, 2164, 2165, 2167 and 2238 lie away in the village. In para-14, he had stated that



he had not paid rent and obtained rent receipt. He had further stated that two *jamabandis* are there for whole property. The first one is relating to 14 Katthas and 2 Dhurs and the second 19 Katthas and odd Dhurs. Both the *jamabandis* stand in the name of Shiboo Pandit. In para-15 he had stated that he is unable to disclose area of each survey plot lying by the side of road as well as with regard to remaining survey plots separately. In para-16, he had further stated that he has seen *Khatiyan* which stood in the name of Shiboo Pandit. In para-18, he had stated that he is unable to say regarding presence of house standing over which survey plot lying by the side of road. Then he denied the suggestion that his father had put his signature over Ext-B. Then he denied suggestion that these lands are under possession of Khakho Pandit for the last 40-45 years.

27. PW-2 had simply stated over status of the family deposing that the grand sons of Shiboo Pandit are joint. During cross-examination at para-7 he had stated that people have stated regarding jointness of all the family members.

28. Respondent No.7 to 16 are the witnesses examined on behalf of supportive Respondent/defendant. DW-7 is defendant no.1, who had accepted jointness of the family as well as Schedule-B property. He had tried to patch up the case of the appellant/plaintiff by way of exhibiting the relevant documents as well as disclosing the event as during course of survey the land was recorded in the name of four brothers. He had further disclosed presence of building over

respective survey plots. Then at para-5 had stated that all the plots are joint. Family is joint, however, the family members are living according to their own convenience. Then had denied the story advanced by the Respondent/Defendant No. 3 to 6 that any sort of document was executed wherein Survey Plot No. 1754, 1755 and 3159 was given under exclusive share of Khakho Pandit. Also denied signature of respective parties over Ext-B. Also filed certified copy of relevant order-sheet and case no. 113/79-80 to suggest that mutation was effected in unscrupulous manner. Then had pleaded his status with regard to Survey Plot No. 2166 as well as also supported the case of appellant/plaintiff regarding Survey Plot No. 1756. Also claimed Khesra No. 2164. Cross-examination, on behalf of plaintiff as well as other defendants are not so relevant. Save and except, on behalf of Respondents/Defendants no. 3 to 6. At para-20, he had stated that there happens to be two buildings standing over the land lying in the midst of village over Survey Plot Nos. 2167 and 2163. He along with others used to reside over Survey Plot no. 2176. He is residing separately for the last 12-14 years. He had further stated that Hiralal Pandit resides in a building standing over Survey Plot No.2163. Then there has been cross-examination over presence of litigation with regard to Survey Plot No. 2164 before Munsif regarding wrong survey entry by all the four brothers as well as for removal of electric pole having installed thereupon. He had further stated that he is in possession of signature of his uncles Chamroo Pandit and Phagu

Pandit. Then had denied the suggestion of the defendant that there was partition and on account thereof, Respondents/Defendants no. 3 to 6 have got Survey Plot Nos. 1754, 1755 and 3159 in their exclusive share and possession.

29. DW-8 had deposed over jointness. In para-6 of his cross-examination, he had stated that family members of all the brothers are not residing in the same house. DW-9 is the person who had executed sale deed in favour of Defendant No.11 relating to Survey Plot No. 2166 and accordingly is irrelevant.

30. DW-10 is formal in nature who had exhibited relevant rent receipt and as such is worthless so far present controversy is concerned. DW-11 has come to depose that in the year 1980 step was taken for partition in the family but could not materialized. During cross-examination, on behalf of Respondents/Defendants no. 3 to 6 he had clearly stated that Raghunath Pandit, Lallan Pandit, Santosh Pandit have not signed. Again said that Raghunath Pandit had put his signature. DW-12 is also on the same point.

31. DW-13 is Hiralal Pandit, Defendant No.1 who had reiterated the same version with regard to continued joint status of the family. Furthermore, had stated that in the year 1980 step was taken for partition of the property, however, remained inconclusive. During cross-examination at the end of Respondents/Defendants no. 3 to 6 he had stated that no Survey Plot no. was mentioned in the Panchnama. He is not able to remember whether any Holding No. was given or

not. In para-7 he had stated that this case has been instituted at his direction.

32. PW-14 is formal in nature who had exhibited deed of Panchnama of 1980. DW-15 is formal in nature who had exhibited the plaint filed on behalf of all the four brothers. DW-16 is also formal in nature.

33. Now coming to the status of Respondent/Defendants N0.3 to 6, DW-1 to 6 have been examined on his behalf. DW-1 is Sukhdeo Sah who had deposed that on earlier occasion, he had seen all the brothers, namely, Chamroo Pandit, Khakho Pandit, Phagu Pandit and Ganesh Pandit @ Baisakhi Pandit residing in jointness, however, about 40-42 years ago the remaining three brothers separated Khakho Pandit and gave him 13-14 Kattha of land over which house of Khakho Pandit lies. He had denied that the aforesaid land happens to be in jointness with other coparceners. During cross-examination at the end of other defendants, in para-5 he had shown inability to state in which year they partitioned. He had further stated that he came to know from neighbours regarding partition. He had further stated that partition was effected through court. In para-6, he had further stated that he is unable to say total area of land possessed by all the four brothers. In para-7, he had stated that the land which has been allotted to Khakho lies adjacent to road having an area of 14 Kattha. Rest brothers got their lands in the village. He is unable to say the exact area allotted to remaining brothers. In para-10 he had

admitted on behalf of appellant/plaintiff that their mother had purchased land and Phagu Pandit had constructed house thereupon. In para-11, he had stated that only 2-3 rooms are standing over the land having 14 Kattha while remaining area is open space.

34. DW-2 is another witness on this score who had stated that he had seen all the four brothers. He had seen the disputed land as his house stands in front of it intervened by a road. He had seen possession of Khakho Pandit over disputed land at an earlier occasion. Presently, his descendants are residing there. He came to know from Kishun Sah that the aforesaid land has been allotted to Khakho Pandit on partition. Kishun Sah is dead. During cross-examination he had stated that this land is fit for business. Defendants are doing business over it. In para-4 he had stated that partition was not effected in his presence. In para-7 he had stated that two rooms are existing over the plot since before. In para-9, he had stated that five rooms are over the plot.

35. DW-3 had stated that he knew Chamroo Pandit, Khakho Pandit, Phagu Pandit and Ganesh Pandit @ Baisakhi Pandit are the sons of Shiboo Pandit. All of them died. All the four brothers got themselves separated long long ago. Again he said that remaining three brothers have separated Khakho Pandit and gave land near Middle School by the road side having area of 12-14 Katthas. Then, had denied event of jointness. During cross-examination, he had stated that some of the brothers was working with him at Jamalpur



Factory. Further he stated that partition was not effected in his presence. However, two brothers who were working with him, during course of talk, disclosed that they had partitioned and gave lands to Khakho Pandit. This talk was about 40 years ago. He had further disclosed that he had seen the papers relating to partition. Then had stated in para-5 that at the time of survey, Shiboo Pandit was alive on account thereof, all the properties were recorded in the name of Shiboo Pandit.

36. DW-4 is formal who had deposed over death of learned counsel who had sent the Advocate notice on behalf of Khakho. DW-5 is Krishna Pandit, defendant no.4. During his examination-in-chief, he had denied the factum of jointness. He had further stated that there was disruption in the family and on account thereof, Survey Plot Nos. 1754, 1755 and 3159 were allotted to the share of his father and in token thereof, his remaining uncles have executed deed of agreement (Ext-B) with an objection. He had further stated that before execution of agreement his father had served an Advocate notice over his uncle (exhibited). He had further stated that his father had applied for sanctioning map which was accorded by the Municipality (exhibited). He had further stated that he came to know from his father regarding partition as well as allotment of aforesaid area. He had further stated that he used to pay rent and is in possession of rent receipt. He had further stated that his father constructed house thereupon. He had further stated that the land is under their exclusive possession. He had

denied the plea of plaintiff that these plots happens to be the joint family property.

37. During cross-examination, he admitted so far status of land being ancestral. He had further stated that total area of plots, 7-8 in number happens to be 1 Bigha 14 Kaththas and odd Dhurs. This land is situated at two places. One segment is that of 14 kattha lying by the side of the road against which his claims happens to be while another plot lying in the village having area of near about 1 Bigha. In para-6, he stated that three buildings are standing over the land lying at village but he is unable to say the exact area. In para-7, he had further stated that there was 144 Cr.P.C. amongst the parties. In para-8, he had stated that he is unaware regarding Survey plot No. 2164 to be their family property. He had further stated at para-9 that his family is living separately from remaining three uncles since 1947. Family of all the three uncles are residing at same place. In para-10, he had denied the suggestion with regard to institution of Title Suit No. 49/61 as well as 41/61 regarding wrong entry of Survey Plot No.2164 as well as for removal of electric pole from Survey plot No. 2164. He had further shown his ignorance that in the aforesaid Title Suit all the brothers had contested in jointness. Then in para-11 had admitted that by case no. 113/1979-80, *jamabandi* was opened in the name of his mother Tilo Devi. Then at para-17 and 18, there happens to be cross-examination over Advocate Notice as well as deed of agreement. Then he was recalled and further denied signature of Khakho Pandit

over plaint of respective title suit. Then he has been elaborately cross-examined on that very score. An attempt has been made on behalf of remaining parties to have signature of Khakho Pandit before the Court at his end for comparing, however, he declined.

38. DW-6 his formal in nature who had exhibited rent receipt.

39. After having minute observation of evidence available on the record as well as subject to repetition it is manifest that there happens to be consensus amongst the parties over genealogical table as well as regarding nature of property being ancestral one. Respondent/Defendants N0.3 to 6, have had admitted presence of remaining siblings to be joint and only to their interest they have advanced story of partition. From nature of evidence, pleading as well as Ext-B, it is apparent that there is complete absence of evidence of partition amongst the sons of Shiboo Pandit. Being so, now it has to be seen whether Respondent/Defendants No. 3 to 6 have been able to substantiate their plea that their father got separated by remaining three brothers whereunder Survey Plot Nos. 1754, 1755 and 3159 were given to his exclusive share in the year 1947 and since thereafter, they are under peaceful exclusive possession. In an alternative, it has also to be seen whether perfect right of adverse possession has accrued in their favour.

40. So far oral evidence is concerned, the Respondent/Defendants N0.3 to 6, have not been able to extract

anything in their favour either from the evidence of PW-1, appellant/plaintiff himself as well as other members of Respondent/Defendants more particularly, regarding partition as well as allotment of Survey Plot Nos. 1754, 1755 and 3159 to their father Khakho Pandit.

41. So far status of Survey Plot Nos. 1754, 1755 and 3159 is concerned they also found inconsistent as DW-1 had stated that only two rooms are there while defendant, DW-5 himself had stated that five rooms are there. Sanctioned site plan Ext-C speaks otherwise. From the evidence of Defendant (DW-5, para-11) mutation under case No. 113/1979-80 is found controverted with the evidence of DW-11 who had exhibited certified copy of the order-sheet of aforesaid case no. which relates to other. Now, only relevancy of Ext-A as well as Ext-B are to be taken note of. From perusal of Ext-A, it is apparent that it happens to be Advocate notice sent on behalf of Khakho Pandit, father of Respondent/Defendants No. 3 to 6. After perusal of the same it is apparent that there happens to be some sort of unexpected incidence visualizing therefrom. At one occasion partition has been asked for and in case partition was not going to be materialized then in that event, it has specifically been mentioned that Phagu Pandit will take forcible possession over Survey Plot Nos. 1754, 1755 and 3159. What was the occasion for mentioning those plots that too when Advocate notice was sent asking for partition which, in case accepted would have entitled for 1/4th share which

certainly happens to be less than the area having Survey Plot Nos. 1754, 1755 and 3159 in the property left by their Shiboo Pandit. Furthermore, the Respondent/defendant No.3 did not satisfy why their father exempted Survey Plot Nos. 1754, 1755 and 3159 in case partition is not allowed, side by side, the subsequent conduct whereunder Survey Plot Nos. 1754, 1755 and 3159 have been given to the father of Respondent/Defendants no. 3 to 6 appears to be influenced by gramarye. From Ext-A, it is evident that partition was asked for while from Ext-B, it is crystal clear that partition was not effected in the family rather due deliberation, the rest three gave Survey Plot Nos. 1754, 1755 and 3159 to Khakho Pandit, father of Respondent/defendant No. 3 to 6. That means to say, even from Ext-B, it is apparent that no partition had taken place in the family. Furthermore, Ext-B did not recite that share to the extent of $\frac{1}{4}^{\text{th}}$ of each of coparcener or Khakho Pandit has been identified as well as Khakho Pandit was handed over Survey Plot Nos. 1754, 1755 and 3159 in lieu thereof. When admittedly, the three brothers who remained inside the village have 19 Kattha and odd Dhurs conjointly while Khakho was given 14 Kattha and odd Dhurs that too by the side of the road. Whether this approach does not appear to be unrealistic, unfair, unacceptable.

42. Furthermore, nature of Ext-B speaks a lot including transfer of title and possession in favour of Khakho Pandit without adverting to sanctity of the document whether by such kind of

document really transfer could be acknowledged, having not been registered in accordance with Section 17 of the Registration Act will stock or titular, the same along with proper mode of partition has been explained by the Apex Court in the case of *Siromani v. Hemkumar* reported in *AIR 1968 SC 1299*:-

4. The first question to be considered in this appeal is whether the deed, Es D-4 dated December 27, 1943 is admissible in evidence. On behalf of the appellants Mr. Gupte put forward the argument that the document is inadmissible in evidence as it effected the partition of the properties of the value of more than Rs 100 and it was not registered. It was argued that there was allotment of specific properties to individual coparceners in this document and its registration was therefore compulsory under Section 17 (1) (b) of the Registration Act. In our opinion, the argument put forward on behalf of the appellants is well founded and must be accepted as correct. It was contended on behalf of the respondents that the document was not necessary to be registered because there was only severance of joint status of the members of the coparcenery and there was no partition of the properties by metes and bounds. It is not possible to accept this argument as correct. The relevant portion of Ex. D-4 is to the following effect :

For the partition of our joint land in Mauza Tilgi and Supa and house and utensils etc. and Dhan, Movable and immovable property, amongst us three brothers, the Panchas have been appointed. The partition and distribution effected by the undermentioned Panchas will be acceptable to us and also the undermentioned conditions will also have to be accepted by us.

1. Out of lease land in Mauza Tilgi and Mauza Supa totalling 123 acres, Hem Kumar's share including Jethansi will be 51 acres that is 51 shares and Dinmani's 39 acres that the 39 shares and minor Shiromani's whose guardian is Smt. Sobhagwati 33 acres that is 33 shares. The three of them will be in possession of the same. Out of 123 acres of land, the land near Munga Tikra Gara Para will be given to Dinmani and minor Shiromani through guardian Smt. Sobhagwati for building a house instead of the old house. For building of the house in Munga Tikra the three brothers will give Rs. 60. Out of the 'Mitti Khatu' and Gobar Khatu, there is in the house, after deducting Hemkumar's tenth share will be divided into three equal shares amongst the

three brothers and they will take it so. They will also divide the buried Khatu into their shares.

. We pass on to consider the next question arising in this appeal, namely, whether Hemkumar was entitled to a greater share of Joint family properties for the reason that he was the eldest brother on the principle of "Jethansi" But the doctrine of "Jethansi" or "Jeshtbhagam" is now obsolete and unenforceable. The principle of Hindu Law is equally of division and the exceptions to that rule have almost, if not altogether, disappeared. One of the exceptions was in favour of the eldest son, who was originally entitled to a special share on partition, either a tenth or a twentieth in excess of the others, or some special chattel, or an extra portion of the flocks (Apastamba, II, 6, 14, 10-13; Baudh., II, 2, 2-5; Gaut., XXVIII, 11, 12; Vas., XVII, 42-45; Manu IX, 112, 114, 156). But unequal partition of ancestral or joint property was from early times condemned. The Smritichandrika, the Vyavahara Mayukha and the Viramitrodaya declare that unequal partition is forbidden in the Kali age (Smritichandrika, III, 16, V. May, IV, iv, 11, Viramit., III, 16 (Setlur's ed., 319) The Commentary of Mitakshara on Yajnavalkya, II, 117 is briefly as follows:

“ अयं विषमो विभाग । शास्त्रदृष्टस्तथापि लोकविदिष्ट
त्वान्नानुष्ठेय । अस्वर्ग्यलाक-विद्धिष्टं धर्ममप्याचरेत् तु-इति
निषधात् । तथा महोक्षंवा महाजं वा
श्रोत्रियायोकल्पयंत-इति विधानेपि
लोकविदिष्टत्वादननुष्ठानम् । यथा वा मेत्रावरूणि ग
वशामतवन्ध्यामा लभत-इति । इतिगवालभ्यविधानेपि
लोकविद्धि-ष्टत्वादननुष्ठानम् । उक्तं च यथा नियोगधमानी
नातु-वन्ध्या-वधोपि वा । तथो द्वारविभागोतपि नव संप्रति
वतते ॥-इति । तस्माद्विषमो विभाग । शास्त्रदृष्टपि
लोकविराधाच्छ्रुतिविरोधाच्च नानुष्ठेय इति सममेव
विभजेरत्रिति नियम्यत । मिता. on या. 11.117”

"Unequal division though found in the sastras (e. g., Manu IX, 105, 112, 116, 117, Yaj. II, 114) should not be practiced because it has come to be condemned (or has become hateful to) by the people, since there is the prohibition (in Yaj. I. 156) that an action, though prescribed in the sastras, should not be performed when it has come to be condemned by the people, since such an action does not lead to the attainment of Heaven. For example, though Yaj. I, 109 prescribes the offering of a big ox or a goat to a

learned brahmana guest it is not now practiced because people have come to hate it, or just as, although there is a Vedic text laying down the sacrificing of a cow one should sacrifice a barren cow called anubandhya for Mitra and Varuna' still it is not done because people condemn it And it has been said 'just as the practice of niyoga or the killing of the anubandhya cow is not now in vogue, so also division after giving a special share (to the eldest son) does not now exist."

As between brothers or other relations, absolute equality is now the invariable rule in all the States, unless perhaps, where some special family custom to the contrary is made out (For example, see the decision of the Madras High Court in *Nachiappa Chettiar v. Muthu Karuppan Chettiar*, AIR 1946 Mad 398).

43. In the case of *Kale v. Dy. Director of Consolidation*

(AIR 1976 SC 807), it has been held:-

1) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family.

(2) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;

(3) The family arrangements may be even oral in which case no registration is necessary;

(4) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immoveable properties and therefore does not fall within the mischief of Section 17 (2) (sic) (Sec. 17 (1) (b) ?) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement.

Even if one of the parties to the settlement has not title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owners, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

44. Because of the fact that Ext-B as it speaks neither happens to be memorandum of partition nor it happens to be the deed of partition rather it happens to be another kind of document under banner of agreement whereunder it has been scribed that after executing this document the executant handed it over to Khakho with a direction to construct house and reside therein. None of them or their descendants will claim. Furthermore, it is apparent from the aforesaid Ext-B that these plots are barren while from Ext-A it is apparent that residential buildings stood over these three plots, i.e., Survey Plot Nos. 1754, 1755 and 3159. Presence of building since before has also been supported by the witnesses examined on behalf of Respondent/Defendants N0.3 to 6. Therefore, for want of registration Ext-B lost its legal identity.

45. Now coming to the other aspect, as stated above from para-17 of the WS filed on behalf of Respondent/Defendant No. 3 to 6, it is apparent that he had placed an alternative theory under the banner of adverse possession which, after going through the evidence

of Respondent/defendant examined as DW-5 is found completely deficient nor the witnesses examined on their behalf spoken like so. Therefore, the plea of adverse possession so placed under para-17 of the WS is not at all found substantiated by the evidence.

46. In the case of *Sadasivam v. K. Doraisamy* as reported in *AIR 1996 SC 1724*, the Hon'ble Apex Court has held:-

.....Even if it is accepted that Doraisamy had exercised possession over the lands covered by the sale deed, such possession may be explained by indicating that Doraisamy obtained interest to the extent of half share by virtue of the Will executed by Karuppanna. Hence, as a cosharer, he was expected to possess the lands not partitioned between the parties. Exclusive possession of a cosharer does not amount to adverse possession against other consharers unless such possession is exercised by ousting the other cosharers. There is no such case of ouster of a cosharer and thereafter exercise of exclusive possession openly and as of right by Doraisamy.....

47. From the judgment of the learned lower court it is evident that much reliance has been placed over Ext-B more particularly in the light of Section 90 of the Evidence Act whereunder any document having 30 years old need not require proof by formal evidence, however, failed to appreciate its legal sanctity on account of being unregistered in terms of Section 17 of Registration Act. Waiving of a document to be proved by a formal evidence will not give legal sanctity to the document if the document otherwise requires. Because of the fact that no registration was there and further, the learned lower court failed to consider the nature of the document

along with the fact that would title pass in absence of registration then in that event, the only alternative option opened before the Respondent/Defendants No.3 to 6 was that of adverse possession which though pleaded under para-17 of the WS, however, not proved by adducing cogent and reliable evidence. Then in that event, admittedly being coparcener of family, property being ancestral followed with presumption of jointness under Hindu Law will prevail.

48. From the judgment of the learned lower court it is also evident that the learned lower court has taken much pain in getting signature of the plaintiffs of earlier suit, that means to say, all the four brothers compared with each other (Q series). Those efforts were worthless in the background of deficiency persisting in case of Respondent/Defendants No.3 to 6 as well as inadequacy at the part of the Court itself because of the fact that had there been any sort of confusion in the mind of the Court, the Court was not precluded to have it thoroughly examined, not only relating to Q Series itself rather as Q series with Ext-B to trace out the genuineness of the signature thereupon. The documents having in the name of Tilo Devi is not going to change the scenario more particularly, in the background of nature of property. Being so, the learned lower court was not at all justified in negativating the issue.

49. With regard to other points, the Court below had already considered the maintainability of the suit as well as the right of the appellant/plaintiff. Consequent thereupon, the judgment and

decree passed by the learned lower court is set aside. Appeal is allowed. However, in the facts and circumstances of the case, the parties will bear their own costs.

(Aditya Kumar Trivedi, J)

